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No. 923

IN THE SUPREME COURT OF THE UNITED STATES

..... Term, ...

ORAL WILKINSON, Petitioner

vs.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI
TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CALVIN L. RAMPTON
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IN THE SUPREME COURT OF THE UNITED STATES

ORAL WILKINSON, Petitioner

vs.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI
TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Oral J. Wilkinson, respectfully prays that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Tenth Circuit dismissing the appeal of your petitioner in that court which order was entered on the 16th day of April, 1960.

OPINION

The opinion of the Court of Appeals has not yet been reported, but is set forth in the Appendix hereto.

JURISDICTION

The order of the Court of Appeals was entered on April 16, 1960 and is set forth in full in the appendix hereto. The jurisdiction of this court is invoked under the provisions of 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the ten day appeal period in criminal cases as provided for in Rule 37(a)(2) Federal Rules of Criminal Procedure begins to run from the time judgment is rendered in open court or from the time the judgment is entered in the docket of the court.

2. Whether, where it is the custom of the local court to give notice to counsel for the defendant of the entry of the judgment in the docket of the court, the ten day appeal period begins to run from the date of the entry of the judgment in the docket or from the date of notice thereof.

STATUTE OR RULE INVOLVED

This case involves an interpretation of Rule 37(a)(2) Federal Rules of Criminal Procedure which provides in pertinent part as follows:

"An appeal by a defendant may be taken within ten days after entry of the judgment or order appealed from * * * "

STATEMENT OF THE CASE

The petitioner, O. J. Wilkinson, was convicted in the United States Court for the District of Utah of income tax evasion in violation of Title 26, Sec. 145 (b) (IRC, 1939), Title 26, Sec. 7201, (IRC, 1954).

On January 4, 1960, the petitioner appeared before the court and was sentenced to serve a term of six months and to pay fines totaling $15,000. On January 6, 1960, the judgment and commitment was filed with the clerk of the court. On January 7, 1960, the said judgment and commitment was entered on the docket. A certified copy of the judgment and commitment was mailed to the attorney for the petitioner and was received in his office on or after January 11, 1960. On January 21, 1960, the notice of appeal was filed.

These facts are not contested by any party hereto. They were agreed upon at the time of the presentation to the Court of Appeals for the Tenth Circuit, and are set out in substantially the foregoing form in the opinion of the Court of Appeals, set forth in full in the appendix hereto. Likewise, it is not contested by the parties, and is set forth as an established fact in the opinion of the Circuit Court that it is a procedural custom of Judge A. Sherman Christenson of the United States Court for the District of Utah to mail copies of judgments and commitments to defense attorneys showing thereon information as to the date of their filing in the office of the clerk of the court.

ARGUMENT ON REASONS FOR GRANTING A WRIT

There can be no question that the ten day period for the filing of a Notice of Appeal in a criminal case is jurisdictional and that neither the district court nor the court of appeals can extend this time. Such was the holding of this court in U. S. v. Robinson, 361 U. S. 220, which is relied upon by the Circuit Court as a basis for its Order of Dismissal in this case. The question presented by the instant case, however, is not whether or not the ten days can be expanded; the question is what starts the running of the ten day period?

There is a difference between the circuit courts in this country as to whether or not the ten day period for appeal begins to run from the moment the defendant and his counsel hear the judgment rendered in open court, or whether it begins to run at a later date.

The Second Circuit in the case of U. S. v. Isabella, 251 F(2d) 223, and the First Circuit in the case of Gonzales v. U S 233 F(2) 822, have held that the ten day period begins to run as was stated in the Isabella case "as he heard Judge Edelstein impose sentence upon him."

On the other hand, the Court of Appeals of the Dist. of Columbia in the case of Richards v. U. S., 192 F(2d) 602, held that the ten day period did not begin to run as of the time of rendition of the sentence, but at the subsequent time when the judgment and commitment is entered upon the docket or other record book in the office of the clerk of the court.

This matter requires a determination by this court of what is meant by the term used in Rule 37(a)(2) "Entry

of Judgment." In the instant case the Court of Appeals of the Tenth Circuit did not determine whether or not it would follow the holding of the First and Second Circuits or the holding of the Court of Appeals of the District of Columbia, because it was held that in either event the filing of the Notice of Appeal was too late.

The undisputed facts are that sentence was rendered on January 4, 1960, the sentence was entered in the docket on January 7th, notice of entry was received by defendant's counsel on January 11th, and the notice of appeal was filed on January 21st. The second question to be determined in this action, therefore, is whether or not in those instances where a custom of the court is to give notice, the ten day period begins to run at the time of receipt of such notice.

In the recent case of Rosenbloom v. United States, 355 U. S. 80, this court set aside the dismissal of an appeal by a circuit court. Although the facts in that case are different from the facts int his case, the basic principal is the same—the time does not begin to run until the defendant or his counsel knows, or in the exercise of reasonable diligence should know, that the events have transpired which set off the running of the time. In the Rosenbloom case, the court stated:

> "What transpired at those proceedings is too ambiguous to permit the conclusion that petitioner and his attorney were not justified in believing that petitioner's time to appeal would begin to run on July 8. In these circumstances we think that the Court of Appeals erred in holding that petitioner's notice of appeal was untimely."

Applying the reasoning of the Rosenbloom case to this case,

certainly the custom of the United States Court for the District of Utah justified the petitioner and his counsel in believing that the petitioner's time to appeal would begin to run not earlier than January 11, 1960, when they received notice that the judgment and order of commitment had been entered.

While local court rules or customs may not extend the time for filing the notice of appeal, it appears that resort may be had to such customs to determine what events will start the running of the time. This was the holding of this court in the case of U. S. v. Hark, 320 U. S. 531. In that case the court stated:

> "The judgment of a court is the judicial determination or sentence of the court upon a matter within its jurisdiction. No form of words and no peculiar formal act is necessary to evince its rendition or to mature the right of appeal. And the modes of evidencing the character of the judgment and of attesting the fact and time of its rendition from from state to state according to local statute or custom, from a simple docket entry or the statement of a conclusion in an opinion, to a formal adjudication, signed by the judge or the clerk, in a journal or order book, or filed as part of the record in the case. The practice in federal courts doubtless varies because of the natural tendency to follow local state practice. Unaided by statute or rule of the court, we must decide on the bare record before us what constitutes the decision or judgment of the court below from which appeal must be taken within thirty days after rendition.
>
> "In view of the diverse practice and custom in District courts we cannot lay down any hard and fast rule * * * ."

It should be borne in mind that the entry of the judgment

does not take place in the presence of the defendant or his counsel. It usually does not take place on the date judgment is rendered, and in this case did not take place until three days later. Unless some notice of this entry is given, the counsel of the appellant would have to keep constant vigil at the clerk's office. Such does not seem a reasonable requirement.

Where notice that an order has been entered is required by rule, the running of the time does not begin until notice. Oddo v. United States, 2 C.A., 171 F.2d 854 and Carter v. United States, 10 C.A., 168 F.2d 310.

Rule 49(c) of the Federal Rules of Criminal Procedure provides:

> "(c) Notice of Orders. Immediately upon the entry of an order made on a written motion subsequent to arraignment the clerk shall mail to each party affected thereby a notice thereof and shall make a note in the docket of the mailing."

We will agree that Rule 49(c) is not strictly by its terms applicable here because that rule applies only to orders entered on written motions. Generally it is effective in a case of a motion for a new trial, or other modification of judgment. However, the reasoning behind Rule 49(c) is equally applicable in this case. The reason for that rule is that a defendant should not be bound at his peril to know as of what day a certain thing happened when such a thing did not and would not in the ordinary course of things happen in his presence. As stated above, although Rule 49(c) does not strictly by its terms apply to this case, the custom of the United States Court for the District of Utah, which custom is complied with in this case, prescribes the giving of notice of entry by the mailing

of copies. Therefore, the logic of the Oddo case and the Carter case apply with equal vigor to the facts of this case as they would to a case which came directly within the provisions of Rule 49(c).

As Judge Murrah stated in the Carter Case:

> "The parties to the order are entitled to rely upon the requirements of this rule and the time for appeal does not run against the order until the prescribed notice has been given."

Under the holding of this court in United States v. Hark, supra, the holding of the Circuit courts in the Oddo and the Carter cases should apply with equal vigor to the customs and traditions of the United States Court for the District of Utah as to the strict provisions of Rule 49(c).

CONCLUSION

Counsel submits that a Write of Certiorari should issue to review the order of the United States Court of Appeals for the Tenth Circuit dismissing the appeal of your petitioner in this case upon the following grounds and for the following reasons:

(a) There is a division of authority between the Circuits as to whether the time for appeal in criminal cases begins to run from the rendition of judgment in open court, or from a later date.

(c) The holding of the Circuit Court to the effect that customs of the district court may not be considered in determining when the time for appeal begins to run is a misinterpretation of the case of United States v. Robinson, 361 U.S.

220, and is contrary to the holding of this court in United States v. Hark, 320 U.S. 531.

Respectfully submitted,

CALVIN L. RAMPTON
Counsel of Record for Petitioner
Oral J. Wilkinson
721 Cont'l Bank Bldg.
Salt Lake City, Utah

PROOF OF SERVICE

I, CALVIN L. RAMPTON, counsel of record for appellant, and member of the bar of the Supreme Court of the United States, hereby certifies that on the .....-day of ....., 1960, I served, on behalf of the appellant herein, copies of the foregoing Petition for Writ of Certiorari as follows:

I. On the United States by leaving a copy thereof at the office of A. Pratt Kesler, United States Attorney for the District of Utah at Room 200 Federal Building, Salt Lake City, Utah, and by mailing a copy in a duly addressed envelope with air mail postage prepaid to the Solicitor General, Department of Justice, Washington 25, D.C.

.....
CALVIN L. RAMPTON

APPENDIX I

OPINION OF THE UNITED STATES COURT OF APPEALS TENTH CIRCUIT

FILED
United States Court of Appeals, Tenth Circuit
April 16, 1960
Robert B. Cartwright, Clerk

Appeal From The United States District Court For The District of Utah

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

NO. 6338 — MARCH TERM — 1960
ORAL J. WILKINSON, Appellant,

Vs.

UNITED STATES OF AMERICA, Appellee.

David K. Watkiss, Salt Lake City, Utah, (Calvin L. Rampton, Salt Lake City, Utah, with him on the brief) for Appellant. William J. Adams, Assistant U. S. Attorney, Salt Lake City, Utah, (A. Pratt Kesler, U. S. Attorney, Salt Lake City, Utah, with him on the brief), for Appellee.

Before PICKETT and BREITENSTEIN, Circuit Judges, and SAVAGE, District Judge.

PER CURIAM

The United States moves to dismiss this appeal upon the ground that the notice of appeal was not filed within time.

The defendant Wilkinson, after having been found guilty of income tax evasion in violation of Title 26, §145(b), (I.R.C. 1939), and Title 26, §7201, (I.R.C. 1954), appeared before the United States District Court for the District of Utah for sentencing on January 4, 1960 and was sentenced to serve a term of 6 months and to pay total fines of $15,000. On January 6, 1960 the judgment and commitment was filed with the Clerk of the aforesaid court and was entered upon the docket January 7, 1960. A certified copy thereof was mailed to the attorney for the defendant and received in his office sometime during the work week of January 11-15, 1960. On January 21, 1960 notice of appeal was filed.

Rule 32(a)(2) of the Federal Rules of Criminal Procedure provides that a defendant may take an appeal within 10 days after entry of a judgment or order appealed from. It is conceded that the notice of appeal was not filed within 10 days from either the pronouncement of the sentence from the bench or from the formal entry of the judgment upon the docket. The law is well settled that the taking of an appeal within the prescribed time as mandatory and jurisdictional.[1] United States v. Robinson, 361 U.S. 220; Martin v. United States, 10 Cir., 263 F.2d 516; Lujan v. United States, 10 Cir., 204 F.2d 171; Swihart v. United States, 10 Cir., 169 F.2d 808.

Defendant contends the phrase "entry of the judgment," contained in Rule 37, refers to the actual entry on the docket in the clerk's office, but he also urges that the time for appeal does not begin to run until the defendant has actual or constructive knowledge of the entry. The requirement that

1. A notice of appeal filed out of time confers no jurisdiction on the appellate court.

the defendant have knowledge is said to arise from the district court's procedural custom of mailing copies of formal judgments to defense attorneys. We hold that the running of the 10-day period for filing the notice of appeal is not delayed until the defendant is notified of the entry of the judgment in the clerk's records. The mailing of a copy of the judgment is not required by the rules,[2] and if the district judge requires such mailing, it is for the convenience of defendants and their attorneys. The Robinson case holds that a district judge is without jurisdiction to extend the statutory time for appeal. That case is controlling here.

Motion SUSTAINED.

---

2. Rule 49(c), Fed. Rules Crim. Proc., provides that upon the entry of an order made upon written motion after arraignment, the clerk shall immediately mail each affected party notice thereof. The rule does not require notice of the entry of a judgment and sentence.

APPENDIX II

STATUTES OR RULES INVOLVED

RULE 37(a)(2) FEDERAL RULES OF CRIMINAL PROCEDURE

VIII APPEAL

Rule 37. Taking Appeal; and Petition for Writ of Certiorari.

(a) Taking appeal

* * * * * * *

(2) Time for Taking Appeal. An appeal by a defendant may be taken within ten days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from.

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In the Supreme Court of the United States

October Term, 1959

ORAL WILKINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

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No. 923

ORAL WILKINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 12-14) is not yet officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered April 16, 1960. (Pet. 12.) The petition for a writ of certiorari was filed May 9, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the ten day period within which an appeal may be taken in a criminal case runs from the date of the "entry of the judgment", as set forth in Rule 37(a)(2) of the Federal Rules of Criminal Procedure, rather than from the date of notice thereof to the petitioner, made in conformity with the district court's practice of mailing copies of formal judgments to defense attorneys.

RULE INVOLVED

Federal Rules of Criminal Procedure:

> RULE 37. TAKING APPEAL; AND PETITION FOR WRIT OF CERTIORARI
>
> (a) *Taking Appeal to a Court of Appeals.*
>
> * * * *
>
> (2) *Time for Taking Appeal.* An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, * * *.
>
> * * * *

STATEMENT

The petitioner was tried and convicted on a three-count indictment charging wilfully attempted tax evasion. He appeared in open court with counsel on January 4, 1960, and was sentenced to serve a term of six months and to pay fines totaling $15,000. The formal document of judgment and commitment was filed with the clerk on January 6, 1960, and was entered on the docket on January 7, 1960. Pursuant to the practice of the United States District Court for the

District of Utah, a certified copy of the judgment and commitment was mailed to the petitioner's counsel and was received by him sometime during the work week of January 11-15, 1960. A notice of appeal was filed on January 21, 1960. (Pet. 13.)

On February 18, 1960, the Government filed a motion to dismiss the appeal, on the ground that it was not timely filed. The motion was granted on April 16, 1960. (Pet. 12.)

ARGUMENT

The Court of Appeals was correct in holding that a local practice of mailing copies of formal judgments to defense attorneys does not extend the time for taking an appeal in a criminal case, where it is not disputed that the final judgment was docketed more than ten days prior to the filing of the notice of appeal. Rule 37(a)(2) of the Federal Rules of Criminal Procedure, *supra*, p. 2, permits an appeal by a defendant to be "taken within 10 days after entry of the judgment or order appealed from". In *United States* v. *Robinson*, 361 U. S. 220, 228-229, this Court—noting that the steps taken in the drafting of the Federal Rules of Criminal Procedure "almost conclusively * * * show a deliberate intention to eliminate any power of the courts to extend the time for the taking of an appeal" and that Rule 45(b) "says in plain words that '* * * the court may not enlarge * * * the period for taking an appeal' "—held that "the taking of an appeal within the prescribed time is mandatory and jurisdictional." Earlier, in *United States* v. *Hark*, 320 U.S. 531, 534, this Court made it clear

that the right of appeal matured when the "judicial determination or sentence of the court" was made—in that case, as here, where "a formal judgment is signed by the judge." Cf. *United States* v. *Schaefer Brewing Co.*, 356 U. S. 227.

The cases relied upon by the petitioner as establishing a conflict with the present case are inapposite. The petitioner admits that the facts in *Rosenbloom* v. *United States*, 355 U. S. 80, "are different from the facts in this case" (Pet. 7); *Oddo* v. *United States*, 171 F. 2d 854 (C. A. 2); and *Carter* v. *United States*, 168 F. 2d 310 (C. A. 10), as well as the *Rosenbloom* case, involve the official notification provisions of Rule 49(c) of the Federal Rules of Criminal Procedure, applicable only where there has been "an entry of an order made on a written motion".

CONCLUSION

The decision of the court below is correct, there are no conflicting decisions, and further review is not warranted. The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
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JUNE, 1960.

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